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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76-6718

ROY KIRK FRENCH, III,

Appellant

v.

THE HONORABLE A. EUGENE BLACKBURN,

Appellee

****

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA THREE-JUDGE COURT

****

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16(1)(c), the appellee moves to affirm the judgment of the three-judge court on the ground that the questions presented are so unsubstantial as not to need further argument. This motion is based upon the opinion of the three-judge court which is attached to the brief filed herewith.

WHEREFORE, the appellee prays:

1. That the judgment of the United States District Court for the Middle District of North Carolina, three-judge court, be affirmed.

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF NORTH CAROLINA
THREE-JUDGE COURT

****

BRIEF OF APPELLEE IN SUPPORT OF MOTION TO AFFIRM

****

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SUPREME COURT OF THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA THREE-JUDGE COURT

****

BRIEF OF APPELLEE IN SUPPORT OF MOTION TO AFFIRM

OPINION BELOW

The opinion of the three-judge District Court is not yet reported. It is set out in Appendix 1 to this Brief.

JURISDICTION

The appellant alleges that this Court has jurisdiction of the appeal by virtue of 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

Article 5A of Chapter 122 of the North Carolina General Statutes, N.C.G.S. §122-58.1 et seq. The pertinent text is set forth in Appendix 2.

QUESTIONS PRESENTED

The appellee incorporates by reference the statement of the questions presented previously submitted by the appellant in his Jurisdictional Statement.

STATEMENT OF THE CASE

The appellee incorporates by reference the statement of the case previously submitted by the appellant in his Jurisdictional Statement.

THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL

INTRODUCTION

A motion to affirm the judgment should be granted if the questions on which the decision depended were so wanting in substance as not to need further argument. Hodges v. Snyder, 261 U.S. 600, 43 S. Ct.435, 67 L. Ed. 819 (1923). In other words, in view of previous decisions, the questions want of substance and no further argument is needed. City of Boston v. Jackson, 260 U. S. 309, 43 S. Ct. 129,67 L. Ed. 274 (1922).

The questions presented to the three-judge court were carefully considered and correctly decided based upon indisputable precedents. When the decision is "plainly right" the questions presented do not require further argument. Milheim v. Moffat Tunnel District, 262 U.S. 717, 724, 43 S. Ct. 696, 67 L. Ed. 1199 (1922).

A. THE QUESTION OF THE FAILURE OF ARTICLE 5A OF CHAPTER 122 OF THE NORTH CAROLINA GENERAL STATUTES TO REQUIRE A PROBABLE CAUSE HEARING WAS CORRECTLY DECIDED AND FAILS TO PRESENT A SUBSTANTIAL QUESTION.

The appellee asserts now as he did in the District Court that Article 5A of Chapter 122 of the North Carolina General Statutes, Appendix 2, fails to provide a probable cause hearing within 48 hours after an individual is taken into custody and is therefore unconstitutional. This issue was considered in depth by the three-judge court. See Appendix 1 p. 6-9. That court correctly held that in determining whether due process was denied an individual by reason of being confined without a hearing, the issue turns on the interest involved and fundamental fairness. After noting many cases cited from other jurisdictions, only one of which required a hearing within 48 hours, Appendix 1 p. 7, the court determined that Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), aff'd sub nom.,Briggs v. Arafeh, 411 U.S. 911, 93 S. Ct. 1556, 36 L. Ed. 2d 304 (1973) controls. This case, which was summarily affirmed by this Court, held that it was not unreasonable to confine an individual forty-five days on the basis of a physician's finding. This case is controlling. The maximum time that an individual can be held under North Carolina law is ten days, unless a five-day continuance is requested by the individual. N.C.G.S. 122-58.7(a).

In addition, the appellee argued in the District Court that Article 5A of Chapter 122 of the North Carolina General Statutes does

in fact provide a probable cause hearing. Any person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others may appear before a clerk or assistant clerk of Superior Court and execute an affidavit to this effect. This affidavit must include the facts upon which the affiant's opinion is based. N.C.G.S. 122-58.3(a). If the clerk finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill or inebriate and imminently dangerous to himself or others, he will then issue a custody order. N.C.G.S. 122-58.3(b). The clerk of court must determine whether or not there are "reasonable grounds" to believe the fact alleged. This determination is in essence a probable cause hearing. An independent and detached individual reviews the facts presented and makes a determination. There is nothing in the statute to prohibit the clerk from requiring the presence of the respondent.

If a clerk issues a custody order, a law enforcement officer must take the respondent into custody and immediately upon assuming custody, and in any event within forty-eight hours, shall take the respondent to a community mental health center for examination by a qualified physician. N.C.G.S. 122-58.4(a). A qualified physician shall examine the respondent as soon as possible and in any event within twenty-four hours after the respondent is presented for examination. If the physician finds that the respondent is not mentally ill or an inebriate, or is not imminently dangerous to himself or others, the law enforcement officer shall release him and the proceeding shall be terminated. N.C.G.S. 122-58.4(c).

If the qualified physician finds that the respondent is mentally ill and imminently dangerous to himself or others, he shall transmit his findings in writing to the Court. N.C.G.S. 122-58.4(d). If at a later time, the respondent is found to no longer be mentally ill or an inebriate and imminently dangerous to himself or others, the qualified physician shall release him pending the hearing. N.C.G.S. 122-58.6. Also pending the district court hearing, the qualified physician is authorized to treat the respondent. N.C.G.S. 122-58.6(c).

In addition to the reasonableness of providing a final hearing within ten days, there are many other protections for the respondent pending the hearing. Therefore, the probable cause hearing advocated by the appellant is not constitutionally required. See Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed. 2d 54 (1975); Morrissey v. Brewer, 408 U.S. 471, 485, 92 S.Ct. 25, 33 L. Ed. 2d 484 (1972). This question is not sufficiently substantial to require further argument.

B. THE QUESTION OF THE ADEQUACY OF WRITTEN NOTICE SET FORTH IN N.C.G.S. § 122-58.5 WAS CORRECTLY DECIDED IN THE LOWER COURT AND FAILS TO PRESENT A SUBSTANTIAL QUESTION.

The three-judge court opinion as to the issue of notice provided in N.C.G.S. § 122-58.5 is plainly right and this issue does not present a substantial question. The lower court held that the notice provided was entirely adequate since it stated not only the time and place of the hearing but also:

(1) of the purpose of the hearing;

(2) the right of counsel;

(3) that he would be given the opportunity to present evidence at the hearing; and

(4) that the presiding judge would then determine whether he should be released, be committed for up to ninety days, or undergo outpatient treatment. Appendix 1 p. 10.

Nothing more is required. The lower court correctly noted that the plaintiff was attempting to require more detailed notice than is constitutionally required in a criminal proceeding. Appendix 1 p. 11; See Weatherford v. Bursey, U.S. , 97 S.Ct. 837, 45 U.S. L.W. 4155 (1977).

In addition, the North Carolina Supreme Court has also interpreted the Constitution of North Carolina to require the same notice. "The law of the land [Article I, Section 19, Constitution of North Carolina] and due process of law are interchangeable terms and both import notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Hagins v. Redevelopment Commission, 275 N.C. 90, 165 S.E. 2d 490 (1969)...." Smith v. Keator, 285 N.C. 530, 535, 206 S.E. 2d 203 (1974). The General Assembly of North Carolina must have intended that the notice provisions meet constitutional requirements, both State and federal. Therefore, this statute can be interpreted by State courts to require more or less notice than is currently given. This issue would not be substantial.

Finally, when the proceedings in question are considered and the fact that the individual will have an attorney to represent him, the notice is sufficient

Based upon this information, the attorney can seek out whatever other information may be needed.

In summary, the opinion of the lower court is plainly right. In addition, when the merits of the argument are considered, a substantial question is not presented.

C. THE ISSUE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IN A COMMITMENT PROCEEDING FAILS TO RAISE A SUBSTANTIAL QUESTION.

The lower court correctly determined this issue. Appendix 1 p. 14. Although there is a liberty interest involved, the mere fact that liberty may be at stake does not automatically invoke the privilege. See Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L. Ed. 2d 556 (1976); Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed. 2d 810 (1976). The privilege is limited to those situations where the evidence compelled will be used in a subsequent criminal case. Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178, 47 L. Ed. 2d 370 (1976); Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed. 2d 274, 281 (1973); Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972). It is clear that based upon the precedence of this court, the lower court correctly decided this issue.

In addition, when the type of proceedings are noted, the determination of the lower court becomes even more compelling. To apply the privilege to the commitment proceedings would be to make them unworkable and ineffective and to prevent the State from serving a very important interest. That interest is the protection of those mentally ill persons who were imminently dangerous to themselves or others. See Gomez v. Gaughan, 71 F. 2d 794 (1st Cir. 1973); Hawkes v. Lazaro, W. Va. , 202 S.E. 2d 109 (1974). The lower court was plainly right in its determination.

D. THE ISSUE OF WHETHER A STANDARD OF PROOF BEYOND A REASONABLE DOUBT, BASED AT A MINIMUM ON A RECENT ACT, ATTEMPT OR THREAT, TO DO SUBSTANTIAL HARM TO ONE'S SELF OR OTHERS, DOES NOT PRESENT A SUBSTANTIAL QUESTION.

The lower court correctly held that the standard of proof of clear, cogent, and convincing evidence set forth in N.C.G.S. 122-58.7(i) is constitutionally sufficient. Appendix 1 p. 16. The lower court correctly noted that the jurisdictions which have considered this question are split as to whether a reasonable doubt standard or some other standard is required. See Appendix 1 p. 17 Note 16. After noting that the fact that liberty may be at stake does not exact a standard of proof beyond a reasonable doubt, Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed. 2d 120 (1960); Nishikawa v. Dulles, 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed. 2d 659 (1958), the Court determined that the adoption of a standard of proof beyond a reasonable doubt would seem to be an impossible burden. It correctly determined that the interest of the State and the interest of the individual can best be balanced by the use of the clear, cogent and convincing standard adopted by the North Carolina General Assembly.

In addition to urging that this Court require a standard of proof of beyond a reasonable doubt, it is further contended that a recent overt act, attempt or threat of substantial harm must be shown before an individual can constitutionally be committed. This issue is also unsubstantial. The requirement for an overt act, attempt or threat was first enunciated in Lessard v. Schmidt, 347 F. Supp. 1078 (E.D. Wis. 1972); vacated and remanded, 414 U.S. 473 (1974); on remand, 379 F. Supp. 375 (E.D. Wis. 1974) vacated and remanded 412 U.S. 957 (1975); on remand 413 F. Supp. 1318 (E.D. Wis. 1976). This case is the basis for all other cases holding that an overt act, attempt or threat is required. Lessard v. Schmidt relies on Cross v. Harris, 135 U.S.App. 259, 418 F. 2d 1095 (D.C. 1969) as its basis for determining an overt act, attempt or threat is required. This

reliance was misplaced. Cross merely stated that in determining dangerousness there must be a high probability of substantial injury. In certain situations an overt act, attempt or threat may not be required in order to find a high probability of substantial injury. See Comprehensive Textbook of Psychiatry/II 2d Ed., Friedman, Kaplan and Saddock, Williams and Wilkins Company (1975) p. 906, 909.

The North Carolina courts have adopted a similar standard to that of Cross.

> "The words 'imminently dangerous' simply mean that a person poses a danger to himself or others in the immediate future. An overt act may be clear, cogent and convincing evidence which will support a finding of imminent danger, but we cannot agree that there must be an overt act to establish imminent dangerousness."
> In re Salem, et al, 31 N.C.App. 57 (1976). See also In re Hatley, 291 N.C. 693, 699, 231 S.E. 2d 633 (1977).

It is clear from the above-cited authority that a recent overt act, attempt or threat is not constitutionally mandated. In the vast majority of situations, such evidence will be the basis for commitment. However, the Constitution does not require it. Therefore, this issue does not present a substantial question.

E. THE ISSUE OF A DENIAL FOR FAILING TO PROVIDE A RIGHT TO TRIAL BY JURY DOES NOT PRESENT A SUBSTANTIAL QUESTION.

The contention of the appellee that he is denied equal protection because a jury trial is not allowed in a commitment proceeding, N.C.G.S.§122-58.7, while a jury trial is required in a lunacy proceeding, N.C.G.S. §35-2, and in a criminal proceeding and in other civil proceedings. Constitution of North Carolina, Article I, Section 24 and Section 25. The lower court correctly held that the appellee was not in the same class as other persons who are subject to lunacy proceedings, criminal prosecution,or other civil proceedings involving property. See Appendix 1 p. 20-21. The standards and purposes of the different proceedings are distinct. Therefore, the appellee is not similarly situated as persons subject to the other proceedings.

In addition, the Court found that based on a rational basis test, there is justification for this distinction. A judge may be better suited to determine mental illness and imminent dangerousness than a juror, while the practical wisdom of a jury may be better suited for determining whether an individual can handle his own affairs. See Appendix 1 p. 21. The decision of the lower court was plainly right. This issue does not present a substantial question.

It should also be noted that there is no constitutional right to a trial by jury in this situation. See McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), reh. den. 392 U.S. 947, 88 S. Ct. 2270, 20 L. Ed. 2d 1412; Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970).

CONCLUSION

Based upon the foregoing argument, the decision of the United States District Court for the Middle District of North Carolina,

three-judge court, was in all respects correct. The issues raised on appeal by the appellant failed to present substantial questions and the appellee's Motion to Affirm should be granted.

Respectfully submitted,

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Greensboro, N. C.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

ROY KIRK FRENCH, III, on behalf of himself and all other persons similarly situated,	:	
Plaintiff	:	
v.	:	
	:	C-76-52-WS
THE HONORABLE A. EUGENE BLACKBURN, Clerk of Court for the Twenty-First Judicial District of the State of North Carolina, as representative of a class of defendants similarly situated,	:	
Defendant	:	

THREE-JUDGE COURT

Heard February 24, 1977 Decided March 31, 1977

Before CRAVEN, Circuit Judge, GORDON, Chief District Judge, and WARD, District Judge

Legal Aid Society of Forsyth County, Winston-Salem, North Carolina, by Bertram Ervin Brown, II, (Gerald C. Kell on brief) for the Plaintiff; Isaac T. Avery, III, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for the Defendant; North Carolina Civil Liberties Union Legal Foundation, Inc., by Norman B. Smith, Greensboro, North Carolina, and Barry Nakell, Chapel Hill, North Carolina, as Amicus Curiae.

OPINION OF THE COURT

WARD, District Judge

This is an action for declaratory and injunctive relief to declare unconstitutional and to permanently enjoin the enforcement of the North Carolina involuntary commitment procedure set forth in Article 5A of Chapter 122 of the North Carolina General Statutes. Since the complaint draws into question the constitutionality of a state statute, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. The facts, having been established by the pleadings and stipulations, are without material dispute, and the parties have filed cross motions for summary judgment under Rule 56, Federal Rules of Civil Procedure.

The plaintiff, Roy Kirk French, III, has been subjected to the proceedings under the statute on two separate occasions. The defendant, A. Eugene Blackburn, is sued in his official capacity as the Clerk of Superior Court for the Twenty-First Judicial District of North Carolina.[1]

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[1] The plaintiff seeks to prosecute this action on behalf of himself and others similarly situated and against a class of defendants composed of all of the Clerks of Superior Court in North Carolina pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. This action is an attack on a statute of state-wide application and the relief, if granted, would by its very nature apply to all persons similarly situated with the named parties to this action. If the statutes in question are held unconstitutional, we have no reason to believe that the appropriate North Carolina authorities would do anything else but follow the decisions of this Court. We, therefore, perceive no reason to certify this action as a class action under Rule 23(c) of the Federal Rules of Civil Procedure. Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972); cf. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975). See also United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida, 493 F.2d 799 (5th Cir. 1974); Hatfield v. Williams, 64 F.R.D. 71 (N.D. Iowa 1974).

Proceeding under N.C.G.S. § 122-58.3, the plaintiff's mother, on January 19, 1976, filed a sworn petition which provided the basis for a finding by the assistant clerk of superior court that there were reasonable grounds to believe that the facts alleged in the petition were true and that the plaintiff was probably mentally ill or an inebriate and imminently dangerous to himself or others. The assistant clerk then issued a custody order under N.C.G.S. § 122-58.3(b) and a notice of the hearing for involuntary commitment under N.C.G.S. § 122-58.5.

Pursuant to N.C.G.S. § 122-58.4, the plaintiff was, on the same date, taken into custody and transported to Reynolds Health Center, Winston-Salem, North Carolina, and there examined by a qualified physician who found him to be mentally ill or an inebriate and imminently dangerous to himself or others and who therefore recommended that he be hospitalized. The plaintiff was confined to the Community Health Center of Reynolds Memorial Hospital from January 19, 1976, to the time of the hearing on January 28, 1976. The hearing resulted in the release of the plaintiff, it being found by the presiding judge that although the plaintiff may have been mentally ill or inebriate, that it had not been shown that he was imminently dangerous to himself or others.[2]

The foregoing procedures resulted in this sweeping attack

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[2] By a second supplemental complaint, the plaintiff indicates that he was again subjected to confinement in a mental health facility, based on a petition by his father, from January 31, 1977, until the date of another hearing on February 9, 1977.

on the North Carolina involuntary commitment procedures.[3] The plaintiff contends that the procedures violate the due process clauses of the fifth and fourteenth amendments due to: (1) the failure to provide a probable cause hearing within 48 hours of the initial custody of a respondent in the involuntary commitment proceedings; (2) the type of notice of the hearing which is given to a respondent; (3) the ability of counsel to waive, with the court's consent, the presence of the respondent at the hearing; (4) the failure to require that the respondent be advised of his right against self-incrimination; and (5) the failure to provide for proof beyond a reasonable doubt based upon a recent overt act, threat, or attempt. The plaintiff further argues that his right to equal protection of the laws has been denied since he is not entitled to a jury trial whereas such is available to those persons subjected to lunacy proceedings under N.C.G.S. § 35-2.[4]

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[3] The defendant argues that this case is moot since the plaintiff is not confined, the hearings for his commitment having been terminated in his favor. We find that the case is not moot as the issues may be said to be "capable of repetition yet evading review." Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). The facts here satisfy the recently articulated two-pronged test of Weinstein v. Bradford, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975), as (1) the issues presented here cannot be fully litigated prior to the cessation of the involuntary commitment proceedings at the statutory hearing since that hearing is generally held nine days after custody is obtained and (2) due to the plaintiff's history, there is a reasonable expectation that he would be subjected to the same action again, as is demonstrated by the plaintiff's second supplemental complaint. See note 2, supra.

[4] By stipulation, the plaintiff dismissed his allegation that the failure to provide a jury trial in involuntary commitment violates the due process clause of the fifth and fourteenth amendments.

We find that this broadside attack on the North Carolina statutory procedures for involuntary commitment is without merit and will, therefore, grant the defendant's motion for summary judgment.[5]

The Court is of the general opinion that the North Carolina General Assembly has enacted an excellent legislative scheme which adequately protects the interests of all who may be involved in an involuntary commitment proceeding. We perceive no reason to hold the statutory provisions unconstitutional. There is no doubt that the liberty interest of a person subjected to such proceedings is great and is an interest which has long been protected and to which the state and this Court are obligated to give great deference. However, we are presented with the concept of "fundamental fairness." It is the opinion of this Court that that concept is fully realized by the statutory procedure involved. There are two humanitarian purposes of the involuntary commitment

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[5] The defendant has urged this Court to abstain. We decline to do so. Unlike the situations in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), and Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), federal interference with the state judicial process is not present. There is no commitment proceeding pending in state court against this plaintiff and considerations of equity and comity are absent. We likewise find the abstention doctrine of Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), inapplicable as it is firmly established that abstention is not proper where the statute in question is not susceptible to two interpretations. Where the statute which is attacked is clear and unambiguous on its face and is attacked as unconstitutional on its face, abstention is improper. Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963).

proceedings. Fundamentally, the state is attempting to temporarily withdraw from society those persons whose mental state is such that their presence may pose a danger to society or to themselves. Secondly, the state is providing treatment to those individuals who may not otherwise have the wisdom or the wherewithal to seek it themselves. We are, therefore, examining a hybrid proceeding which although involves a deprivation of liberty, the very purpose of that deprivation is not solely to protect society but also has as a purpose the protection, treatment, and aid of an individual who cannot or will not protect himself.[6] We find that in balancing these interests, the North Carolina statutes for involuntary commitment strike a fair and equitable balance and do not offend the constitutional standards of due process of the law.

I. Probable Cause Hearing

The plaintiff asserts that a probable cause hearing should be held within forty-eight hours after the respondent in an involuntary commitment proceeding is taken into custody to be examined by a qualified physician. The statutory procedure of N.C.G.S. § 122-58.7 currently provides only for a final hearing on commitment within ten days after his custody unless the respondent is given a continuance which may be for up to five days at a time.

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[6] Although the respondent is taken into "custody," the "confinement" is only in a place where examination and treatment are available. Under N.C.G.S. § 122-58.4(a), it is specifically provided that detention shall not be in a jail or other penal facility. Pursuant to N.C.G.S. § 122-58.6(c) when the respondent is awaiting the district court hearing, medication and treatment are authorized.

Every court which has addressed this issue has held that due process demands that some sort of a hearing be held within a reasonable time after confinement or custody. These same courts vary as to the time in which such a hearing must take place.[7] The issue before this Court should not be phrased, nor should it be resolved, in terms of required days, hours, or minutes, but should rather turn on the basis of the interests involved and fundamental fairness. The due process clause does not deal in magic numbers, but fundamental fairness.

We are of the opinion that the provision of N.C.G.S. § 122-58.7 which calls for a hearing within ten days of the respondent's custody is not unconstitutional. During this time period the respondent is receiving treatment, Id., § 122-58.6, which may not only aid his mental health, but which also may be necessary to an adequate and informed hearing on the necessity of his commitment. The nature of the confinement itself is limited to the humanitarian purposes of the proceedings as by the very terms of the statute, custody may not be accomplished in a jail or other penal facility but in an institution where treatment and medication are available. Id., § 122-58.4(a). The ten-day period appears even more

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[7] In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971)(7 days); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975)(5 days); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, ___U.S.____, ___S.Ct.___, 47 L.Ed.2d 731 (1975) (72 hours); Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974)(5 days); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974)(7 days); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976)(48 hours).

reasonable in light of the additional procedural safeguards afforded a respondent, which, among other things, gives the respondent at least two opportunities to be released prior to the hearing based upon medical examinations and the findings of the qualified examining physician.[8] In light of the fact that the inquiry throughout the proceedings is aimed at the respondent's mental health, this Court is very reluctant to substitute another judgment in lieu of the legislature's deference to qualified medical opinion at these initial stages of the involuntary commitment proceedings.

In addition to these considerations, the Court is very much persuaded by the reasoning of Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976), which held that a hearing within twenty days was constitutionally permissible. The Coll opinion in turn relies heavily on Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), aff'd sub nom., Briggs v. Arafeh, 411 U.S. 911, 93 S.Ct.

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[8] The custody order itself cannot be issued until the clerk or magistrate finds that there are "reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill or inebriate and imminently dangerous to himself or others . . . ." N.C.G.S. § 122-58.3(b). Within forty-eight hours, the respondent is then taken to a qualified physician who must, within another twenty-four hours, examine the respondent. Id. §§ 122-58.4(a), (c). The statute then provides that if the physician finds the respondent not mentally ill or inebriate or not imminently dangerous to himself or others, he shall be released and the proceedings terminated. Id. § 122-58.4(c). If the physician finds to the contrary, then the respondent is taken to a mental facility for treatment, observation, and further examination. Id. §§ 122-58.4(c), -58.6. Within another twenty-four hours, the respondent is there examined by a qualified physician who will release him pending the hearing if it is found that he is not mentally ill or inebriate or is not imminently dangerous to himself or others. Id. § 122-58.6(a). Therefore, within a time period of ninety-six hours after having been taken into custody, the respondent is examined by two qualified physicians either of which examinations may result in his release.

1556, 36 L.Ed.2d 304 (1973), in which a three-judge court ruled that confinement on the basis of a physician's findings for a period of forty-five days pending a hearing was not unreasonably long and did not constitute a denial of due process. This opinion was summarily affirmed by the Supreme Court and is, therefore, binding precedent under Hicks v. Miranda, 422 U.S. 322, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). Since the Supreme Court has found that a forty-five day confinement pending a hearing is not unreasonable, we find that the North Carolina ten-day custody period prior to a full adversary hearing does not constitute a denial of due process.

II. Notice

N.C.G.S. § 122-58.5 states:

> Upon receipt of a qualified physician's finding . . . the clerk of superior court shall . . . calendar the matter for hearing, and notify the respondent and counsel of the time and place of the hearing. Notice must be given at least 48 hours in advance, unless waived by counsel for the respondent.

Plaintiff contends that the notice provision is constitutionally deficient in that it does not indicate a basis of the detention, does not set forth the standard of proof required at the hearing, does not inform him of a right to a jury trial, and does not indicate the names of the witnesses and/or physicians who will testify at the hearing in favor of commitment and the substance of their testimony. We find these assertions to be of little merit.

Due process requires that the notice of a hearing be appropriate to the occasion and reasonably calculated to inform the person to whom it is directed of the nature of the

proceedings. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The concept of due process is not a static one and it does not mandate particular forms of procedure. See, e.g., Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). As stated by the Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314, 70 S.Ct. at ____, 94 L.Ed. at 873:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. [Citations omitted] The notice must be of such nature as reasonably to convey the required information, [citation omitted], and it must afford a reasonable time for those interested to make their appearance, [citations omitted]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

The statute here in question uses the terms "notify" and "notice." There can be little doubt that these terms were used to carry the full panoply of due process notice mandated by the law of the land. We hold that when the legislature used the term "notice" it means that notice as is required by due process and, therefore, conclude that the statute is constitutional on its face.

The notice form used by the defendant to inform the plaintiff of the proceedings against him is entirely adequate. It stated not only the time and place of the hearing but also notified him: (1) of the purpose of the hearing; (2) the right to counsel; (3) that he would be given the opportunity to present evidence at the hearing; and (4) that the presiding judge would then determine whether he should be released, be

committed for up to ninety days, or undergo outpatient treatment.

In light of the nature of the proceedings, we find that this procedure is reasonably calculated to inform the respondent in an involuntary commitment proceeding of the nature and purpose of the hearing and, therefore, is not constitutionally infirm. We can find no constitutional mandate to notify the respondent of the burden of proof or to serve upon him a list of witnesses and the substance of their proposed testimony. Such is not even required in a criminal proceeding. See Weatherford v. Bursey, ____U.S.____, 45 U.S.L.W. 4155 (No. 75-1510, Feb. 22, 1977). Since there is no right to a jury trial in such proceedings,[9] the state is not required to give notice of such. The notice itself states that the basis of the detention is due to the fact that it is alleged that he is a proper subject for commitment.[10]

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[9] See the discussion of the plaintiff's equal protection claim, infra.

[10] At first blush it would appear that it might be better to serve the respondent with a copy of the petition or affidavit forming the basis of his custody. This would parallel the service of a copy of the complaint in a traditional civil action and a copy of the indictment or information in a criminal proceeding. However, this Court does not say that such is constitutionally mandated here in light of the nature of the proceedings, the subject matter thereof, and the parties thereto. As was the case here, the petitions may have been filed by members of the respondent's family and service of such might possibly cause more harm to such a respondent than nonservice. The fact that such is not served does not, in this Court's opinion, violate the concept of fundamental fairness.

It is also constitutionally mandated that the notice be given sufficiently in advance of the proceedings to provide a reasonable opportunity to prepare. The statute states that at the minimum the notice should be served at least 48 hours in advance of the hearing.[11] We find this time period constitutionally adequate to allow for sufficient preparation, especially in light of the fact that continuances may be granted, N.C.G.S. § 122-58.7(a), which will prevent any prejudice because of insufficient time to prepare.

We, therefore, conclude that the notice provision of N.C.G.S. § 122-58.5 is constitutionally sufficient on its face and as applied in the case before us.

III. Waiver of the Presence of Respondent at the Hearing

N.C.G.S. § 122-58.7(d) provides that: "With the consent of the court, counsel may in writing waive the presence of the respondent." Plaintiff has asserted that the waiver provision violates due process, stating that respondents have an "unwaiverable" right to be present.[12]

All courts which have addressed this issue have held that the presence of one subjected to an involuntary commitment

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[11] On both occasions when the plaintiff was subjected to the procedure he was given notice some nine days prior to the date of the hearing, as it was given on the same day that he was taken into custody.

[12] The right to be present at the hearing cannot be said to be "unwaiverable" as even in criminal proceedings one's right to confrontation can be waived by conduct, Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), or by consent such as through absence, Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973). There is no doubt, therefore, that the right to be present can be waived; the real issue is whether the North Carolina waiver provisions are sufficient to comport with due process.

hearing could be waived or excluded. See, e.g., Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, ___U.S.___, ___S.Ct.___, 47 L.Ed.2d 731 (1975); Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976).

The plaintiff, relying in part on the above-cited authority, asserts that the statute violates due process since there are no explicit standards for waiver set forth therein. We cannot agree with this conclusion as it assumes that a lawyer will not act in the best interests of his client. In light of the very nature of the lawyer-client relationship and in light of the ethical obligation of the lawyer to act for his client's best interests,[13] we cannot adopt the premise that a lawyer would waive his client's presence other than when it would be to the client's own benefit due to his mental or physical condition or for some other valid reason. Nor can we assume that a court would consent to such a waiver without some legitimate reason being presented to it. To assume otherwise would be to suggest that the court and the advocate somehow conspire to deprive the respondent of his constitutional rights in violation of the very ethics and responsibilities of their respective positions.

The plaintiff quotes the following passage from Suzuki v. Quisenberry, 411 F. Supp. 1113, 1130 (D. Hawaii 1976):

> While a committing court may exclude a respondent where his presence makes it impossible to

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[13] See Canon 7 of the Code of Professional Responsibility of the North Carolina State Bar printed as Appendix VII of the North Carolina General Statutes.

> conduct the hearing in a reasonable manner, the court may not decide in advance of hearing and based solely on the certificates of physicians that the respondent shall not be allowed to appear. Some method alternative to total exclusion must be attempted first, such as conducting the proceedings at a psychiatric facility.

The North Carolina statute provides for waiver not on the basis of physicians, but upon a written statement by counsel and with the consent of the court. We find this to be a critical difference. In addition the North Carolina statutory scheme is by its nature informal and closed to the public. N.C.G.S. § 122-58.7(g). In direct relation to the very nature of these statutory proceedings and directly bearing on the issue here presented, the legislature has already considered a reasonable alternative to total exclusion as it has provided in N.C.G.S. § 122-58.7(f) that:

> Hearings may be held in an appropriate room not used for treatment of patients at the mental health facility in which the respondent is being treated, if it is located within the judge's judicial district, or in the judge's chambers. A hearing shall not be held in a regular courtroom, over objection of the respondent, if in the discretion of a judge, a more suitable place is available.

Therefore, one can say that a non-courtroom atmosphere is generally available as an alternative to completely waiving the presence of the respondent at the hearing. The alternative spoken of in Suzuki has been provided by the statute itself.

We, therefore, conclude that the waiver provision of N.C.G.S. § 122-58.7(d) does not offend due process.

IV. Privilege Against Self-Incrimination

Although the fifth amendment's privilege against self-incrimination by its own terms applies only to "criminal cases," case law clearly establishes that the privilege applies to any

type of proceeding be it criminal, civil, administrative, judicial, investigative, or adjudicatory where a witness may reasonably apprehend that his statements could be used in a criminal proceeding or could lead to other evidence which might be so used. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

The plaintiff contends that the privilege should apply to the involuntary commitment proceedings so that no statements made by a respondent in such a proceeding to a psychiatrist could be used to commit him in the absence of a warning to the individual that they might be so used. The plaintiff heavily emphasizes the liberty interest involved and cites authority which, also emphasizing the liberty interest, apply the privilege to such proceedings.[14]

Although the liberty interest is indeed great, the mere fact that liberty may be at stake does not automatically invoke the privilege. See Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976); Baxter v. Palmigiano, ___U.S.___, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

We are of the opinion that to apply the privilege to the type of proceedings here challenged would be to destroy the valid purposes which they serve as it would make them unworkable and ineffective. Gomes v. Gaughan, 471 F.2d 794 (1st Cir. 1973); Hawks v. Lazaro, ___W.Va.___, 202 S.E.2d 109 (1974).

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[14] Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976).

As was the case in Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), aff'g sub nom., Sas v. State of Maryland, 295 F. Supp. 389 (D. Md. 1969), the purpose and effect of these proceedings are not the finding of facts upon which a finding of criminal guilt might be based, but treatment and, therefore, the privilege does not apply.[15] Judge Sobeloff, concurring in part and dissenting in part, in Tippett, 436 F.2d at 1162, made the following persuasive statement when he concluded that the privilege should not apply to proceedings under which prisoners were committed for mental treatment:

> . . . the right against self-incrimination cannot be rigidly applied in Patuxent proceeding. I rest, however, not on the asserted ground that the Act is "civil" but that, because of the unusual nature of the necessary inquiries, the legitimate objectives of the legislation would be frustrated were inmates permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent.

V. Burden of Proof

The plaintiff asserts that the statutory scheme also violates due process because of its failure to provide for proof beyond a reasonable doubt. The statute, N.C.G.S. § 122-58.7(i), provides that: "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others." Although

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15 Tippett was more recently approved in Dower v. Boslow, 539 F.2d 969 (4th Cir. 1976), aff'g in part and reversing in part, 396 F. Supp. 1070 (D. Md. 1975).

the case law is greatly divided on this issue,[16] we are of the opinion that in light of the precedent in the Fourth Circuit and in light of the nature of the involuntary commitment proceedings, that the legislature's choice of the standard of proof does not offend due process.

It should initially be noted that the resolution of this issue does not turn on whether the proceeding is classified as "civil" or "criminal," In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), but rather on the basis of the competing interests at stake and the risk which society is willing to assume for an erroneous decision to commit or an erroneous decision not to commit.[17]

The Fourth Circuit ruled in Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), and again in Dower v. Boslow,

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16 The courts adopting a "clear and convincing" or "clear, unequivocal, and convincing," or "clear, cogent, and convincing" standard of proof are: Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, ___U.S.___, ___S.Ct.___, 47 L.Ed.2d 731 (1975); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Dixon v. Attorney General of Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971); Hawks v. Lazaro, ___W.Va.___, 202 S.E.2d 109 (1974). The courts adopting a standard of proof of beyond a reasonable doubt are: United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975); In re Ballay, 482 F.2d 648 (D.C. Cir. 1973); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976).

17 The mere fact that liberty may be at stake does not exact a standard of proof of beyond a reasonable doubt. The Supreme Court has adopted a clear and convincing standard in revocation of naturalization, Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), in expatriation cases, Nishikawa v. Dulles, 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958), and in deportation proceedings, Woodby v. Immigration Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966).

539 F.2d 969 (4th Cir. 1976), that the Maryland choice of the standard of proof of a preponderance of the evidence in a proceeding to commit prisoners for treatment did not violate due process. The Tippett majority, 436 F.2d at 1158-59, stated:

> We might all be happier had it been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. . . . In any event, in the present state of our knowledge, choice of the standard of proof should be left to the state. A legislative choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice.

Indeed, the liberty interest in Tippett and Dower may be said not to be as significant as that involved here since in those instances the issue was the commitment for treatment, as opposed to a penal commitment, of persons whose liberty had already been deprived as a result of criminal proceedings. However, the involuntary commitment proceedings do not have as their sole purpose the deprivation of liberty, but also have as a significant and valid goal the treatment and aid of a person alleged to be mentally ill or inebriate and who is imminently dangerous to himself or others. The issues in such a proceeding are by their very nature not susceptible to proof of objective facts. Adoption of a standard of proof of beyond a reasonable doubt would seem to be an impossible burden. As stated by Judge Sobeloff, concurring in part and dissenting in part, in Tippett, 436 F.2d at 1165, in urging the adoption of a clear and convincing standard of proof:

> It must be recognized, however, that as to the ultimate issue of the inmate's dangerousness, the beyond a reasonable doubt standard may in practical operation be too onerous. After all, the ultimate issue is not as in a criminal case whether an alleged act was committed or event occurred, but the much more subjective issue of the individuals' mental and emotional character. Such a subjective judgment cannot ordinarily attain the same "state of certitude" demanded in criminal cases.

We, therefore, join those courts which have held that a standard of proof of beyond a reasonable doubt is not mandated by the due process clause, cases cited at note 15, supra, and hold that the North Carolina legislature's choice of proof by clear, cogent, and convincing evidence does not violate that constitutional prohibition.

VI. Equal Protection--Jury Trial

A respondent in an involuntary commitment proceeding is not afforded a jury trial on the issues of whether he is mentally ill or inebriate and imminently dangerous to himself or others. North Carolina gives a jury trial to persons subjected to lunancy proceedings under N.C.G.S. § 35-2 in which a guardian is appointed to handle the affairs of one found by the jury to be mentally defective, mentally disordered, or incompetent from want of understanding to manage his own affairs. This difference in procedure is the basis for the plaintiff's claim that he has been denied the equal protection of the laws.[18]

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[18] The plaintiff also contends that it is a denial of equal protection for N.C.G.S. § 35-3 to provide that one who is confined in a state hospital may have a guardian appointed upon the certificate of the superintendent of the hospital while one not so confined has a jury trial in order for a guardian to be appointed. The plaintiff argues, therefore, that persons confined in a facility pursuant to Article 5A of Chapter 122 of the General Statutes would also be subjected to the appointment of a guardian upon the mere certificate of the superintendent of such facility whereas those not so committed would have a jury make that determination. Assuming arguendo that such is the case, that contention goes to the constitutionality of N.C.G.S. § 35-3, not Article 5A of Chapter 122 of the North Carolina General Statutes.

The equal protection clause demands that the state treat alike persons who are similarly situated in absence of a sufficient justification for the difference in treatment. The provision is not offended if the state action affects all persons similarly situated in like manner. See, e.g., Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885). As stated by Justice Frankfurter: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tinger v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, ____, 84 L.Ed. 1124, 1128 (1940). It is on this point that the plaintiff's argument falters as the state is not treating persons similarly situated differently. It is true that both the class of persons subjected to involuntary commitment proceedings and the class of persons subjected to the appointment of a guardian may have mental problems. However, it is at that point that the similarity ends. The standards and purposes of the proceedings to commit someone who is mentally ill or an inebriate and imminently dangerous to himself or others are entirely different from the standards and purposes of the appointment of a guardian to one who is found incapable of handling his own affairs. They are, therefore, not similarly situated. The authorities cited by the plaintiff, which find a denial of equal protection where the state provides for a jury trial or standards for commitment generally but does not give a jury trial or the same standards for persons to be committed on the basis of a criminal finding of guilt for a particular crime, Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972), or after the termination

of their penal sentence, Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), are not in point. They deal with the problem where the state gives a jury trial to one class of persons to be committed but not to another class of persons to be committed. What we have here is the state giving a jury trial to those persons for whom a guardian is being appointed and not to those persons being involuntarily committed. We perceive no violation of the equal protection clause.

Assuming arguendo that the classification involved did affect persons similarly situated, we are of the opinion that the difference in treatment is totally justified under the rational basis test.[19] A finding that a person is not capable of handling his own affairs so as to require appointment of a guardian seems to us more susceptible to the practical wisdom of a jury than determining whether a person is mentally ill or an inebriate and dangerous to himself or others. The latter finding may not unreasonably have been thought by the legislature to be beyond the competency of a jury.

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19. The rational basis test applies in light of the fact that there is not a fundamental right to a jury trial in civil commitment proceedings. See, e.g., Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D.Ala. 1974). The mere fact that liberty is at stake does not invoke the right to a jury trial. See, e.g., Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970); Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Supreme Court has analyzed an equal protection claim in the context of a state granting a jury trial for persons subjected to civil commitment generally but not for the mental commitment of persons charged with crimes or in prisons, in terms of a rational basis test. See Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); Baxstrom v. Harold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966).

Predicting human behavior is certainly no task for the psychologically uninformed, and it is easier for a psychiatrist to inform one judge than 12 jurors. Also of great concern is the fact that the proceedings for involuntary commitment are informal in their nature and are closed to the public. N.C.G.S. § 122-58.7(g). This privacy and informality, which are obviously legislated for the purpose of protecting one subjected to the proceedings from suffering additional trauma, would be totally lost if a jury were present. Indeed the persons subjected to such a proceeding may not be capable of dealing with a full-blown adversary process. We find these purposes and justifications not only sufficient to pass constitutional muster, but laudible, and conclude that the failure to provide a jury trial in involuntary commitment proceedings does not violate the equal protection clause.

VII. Conclusion

For the above-stated reasons, this Court finds that Article 5A of Chapter 122 of the North Carolina General Statutes is constitutional. In accordance with the foregoing it is ORDERED that: (1) the motion of the defendant for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, be, and the same hereby is, GRANTED; (2) the motion of the plaintiff for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, be, and the same hereby is, DENIED; and (3) the motion of the plaintiff to certify this action as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure, be, and the same hereby is, DENIED.

A judgment shall be entered accordingly.

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: Bobbie D. Fra

ARTICLE 5A.

Involuntary Commitment.

§ 122-58.1. Declaration of policy. — It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminently dangerous to himself or others; that a commitment will be accomplished under conditions that protect the dignity and constitutional rights of the person; and that committed persons will be discharged as soon as a less restrictive mode of treatment is appropriate. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.2. Definitions. — As used in this Article:

(1) The phrase "dangerous to himself" includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter;

(2) The words "inebriety" and "mental illness" have the same meaning as they are given in G.S. 122-36; and

(3) "Law-enforcement officer" means sheriff, deputy sheriff, police officer, and State highway patrolman. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.3. Affidavit and petition before clerk or magistrate: custody order. — (a) Any person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others may appear before a clerk or assistant or deputy clerk of superior court or a magistrate of district court and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a qualified physician. The affidavit shall include the facts on which the affiant's opinion is based. The respondent must be found in or be a resident of the same county as the clerk or magistrate.

(b) If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill or inebriate and imminently dangerous to himself or others, he shall issue an order to a law-enforcement officer to take the respondent into custody for examination by a qualified physician.

(c) If the clerk or magistrate issues a custody order, he shall also make inquiry, as soon as may be and in any manner deemed reliable, as to whether the respondent is indigent within the meaning of G.S. 7A-450. A magistrate shall report the result of this inquiry to the clerk.

(d) An affiant who is a qualified physician may execute the oath to the affidavit before any official authorized to administer oaths. He is not required to appear before the clerk or magistrate for this purpose. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.4. Duties of law-enforcement officer; examination by qualified physician. — (a) Upon receipt of the custody order of the clerk or magistrate, a law-enforcement officer, within 24 hours after the order is signed, shall take the respondent into custody. Immediately upon assuming custody, and in any event within 48 hours, the officer shall take the respondent to a community mental health center for an examination by a qualified physician; if a qualified physician is not available in the community mental health center, he shall take the respondent to any qualified physician locally available. If a physician is not immediately available, the officer may temporarily detain the respondent in a community mental health facility, if one is available; if such a facility is not available, he may cause the detention of the respondent, under appropriate supervision, in the respondent's home, in a private hospital or a clinic, in a general hospital, or in a regional mental health facility, but not in a jail or other penal facility.

(b) If the affiant who obtained the custody order is a qualified physician, the examination set forth in subsection (a) is not required. In this case, the law-enforcement officer shall take the respondent directly to a mental health facility described in subsection (c).

(c) The qualified physician shall examine the respondent as soon as possible, and in any event within 24 hours, after the respondent is presented for examination. If the physician finds that the respondent is not mentally ill or an inebriate, or is not imminently dangerous to himself or others, the law-enforcement officer shall release him, and the proceedings shall be terminated. If the physician finds that the respondent is mentally ill or an inebriate, and is imminently dangerous to himself or others, the law-enforcement officer shall take the respondent to a community mental health facility or public or private facility designated or licensed by the Division of Mental Health Services of the Department of Human Resources for temporary custody, observation, and treatment of mentally ill or inebriate persons pending a district court hearing. If there is no community mental health facility so designated, and if the respondent is indigent and unable to pay for his care at a private facility, the law-enforcement officer shall take the respondent to a regional psychiatric facility designated by the Division of Mental Health Services for custody and treatment of the mentally ill and inebriate, and immediately notify the clerk of superior court of his actions.

(d) The findings of the qualified physician and the facts on which they are based, shall be in writing, in all cases. A copy of the findings shall be transmitted to the clerk of superior court by the most reliable and expeditious means. If it cannot be reasonably anticipated that the clerk will receive the copy within 48 hours of the time that it was signed, the physician shall also communicate his findings to the clerk by telephone. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.5. Duties of clerk of superior court. — Upon receipt of a qualified physician's finding that a respondent is mentally ill or an inebriate, and imminently dangerous to himself or others, the clerk of superior court shall, upon direction of a district court judge, assign counsel, if necessary, calendar the matter for hearing, and notify the respondent and counsel of the time and place of the hearing. Notice must be given at least 48 hours in advance, unless waived by counsel for the respondent. (1973, c. 1408, s. 1.)

§ 122-58.6. Treatment and release pending hearing. — (a) Within 24 hours of arrival at a community or regional mental health facility described in G.S. 122-58.4(c), the respondent shall be examined by a qualified physician. If the qualified physician finds that the respondent is mentally ill or an inebriate, and is imminently dangerous to himself or others, he shall hold the respondent at the facility pending the district court hearing. If the qualified physician finds that the respondent is not mentally ill or inebriate, or is not imminently dangerous to himself or others, he shall release the respondent pending the district court hearing and so notify the clerk of superior court of the county from which the respondent was sent. Unless the respondent provides his own transportation, the law-enforcement officer shall return the respondent to the originating county. If a respondent, so released, fails, upon proper notification, to attend the hearing, and his presence is not waived by his counsel and the court, he may be taken into custody and returned to the releasing facility by any law-enforcement officer on order of the judge. Days the respondent is on release shall not be counted in computing the 10-day period in which the hearing must be held.

(b) The findings of the qualified physician and the facts on which they are based shall be in writing, in all cases. A copy of the findings shall be transmitted to the clerk of superior court by reliable and expeditious means.

(c) Pending the district court hearing, the qualified physician attending the respondent is authorized to administer to the respondent reasonable and appropriate medication and treatment that is consistent with accepted medical standards. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.7. District court hearing. — (a) A hearing shall be held in district court within 10 days of the day the respondent is taken into custody. Upon motion of the respondent's counsel, sufficiently in advance to avoid movement of the respondent, continuances of not more than five days each may be granted.

(b) The district attorney may represent the petitioner in cases of significant public interest.

(c) If the respondent is allegedly mentally ill, he shall be represented by counsel of his choice, or, if he is indigent within the meaning of G.S. 7A-450, or refuses to retain counsel if financially able to do so, by counsel appointed by the court. If the respondent is an alleged inebriate, he may be represented by counsel of his choice, or he may waive counsel, if the judge finds that he is sober and capable of making an informed decision, and that the waiver is voluntary. If the alleged inebriate does not waive counsel and is an indigent within the meaning of G.S. 7A-450, the court shall appoint counsel to represent him.

(d) With the consent of the court, counsel may in writing waive the presence of the respondent.

(e) Certified copies of reports and findings of qualified physicians and medical records of the mental health facility are admissible in evidence, but the respondent's right to confront and cross-examine witnesses shall not be denied.

(f) Hearings may be held in an appropriate room not used for treatment of patients at the mental health facility in which the respondent is being treated, if it is located within the judge's judicial district, or in the judge's chambers. A hearing shall not be held in a regular courtroom, over objection of the respondent, if in the discretion of a judge, a more suitable place is available.

(g) The hearing shall be closed to the public, unless the respondent requests otherwise.

(h) A copy of all documents admitted and, where applicable, a transcript of oral testimony considered shall be furnished by the clerk to the respondent on request. If the respondent is indigent, the transcript shall be provided at State expense.

(i) To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. The court shall record the facts which support its findings. (1973, c. 726, s. 1; c. 1408, s. 1; 1975, cc. 322, 459.)

§ 122-58.7A. Venue of district court hearing when respondent held at regional facility pending hearing. — (a) In all cases where the respondent is held at a regional mental health facility pending the district court hearing as provided in G.S. 122-58.6, unless the respondent through counsel objects to the venue, the hearing required by G.S. 122-58.7 shall be held in the county in which the facility is located.

(b) An official of the facility shall immediately notify the clerk of superior court of the county in which the facility is located of a determination to hold the respondent pending hearing. That clerk shall request transmittal of all documents pertinent to the proceedings from the clerk of superior court with whom the proceedings were initiated. The requesting clerk shall assume all duties set forth in G.S. 122-58.5. The requesting clerk shall appoint as counsel for indigent respondents the counsel provided for in G.S. 122-58.12. (1975, 2nd Sess., c. 983, s. 133.)

§ 122-58.8. Disposition. — (a) If the court finds that the respondent is not mentally ill or inebriate, or is not imminently dangerous to himself or others, he shall be discharged, and the facility in which he was last a patient so notified.

(b) If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill or inebriate, and is imminently dangerous to himself or others, it may order treatment, inpatient or outpatient, for a period not in excess of 90 days, at a mental health facility, public or private, designated or licensed by the Division of Mental Health Services. Treatment at a private facility shall be at the expense of the respondent to the extent that such charges are not disposed of by contract between the county and the private facility.

(c) If the court orders outpatient treatment, and the respondent fails to adhere to the prescribed outpatient treatment program, on report of the failure by the chief of medical services of the treatment facility, the court, upon notice to the respondent and his counsel, may order a supplemental hearing, and further order inpatient treatment in a designated or licensed facility for a period of not more than 90 days running from the date of the order. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.9. Appeal. — The judgment of the district court is final. Appeal may be had to the Court of Appeals, on the record, as in civil cases. Appeal does not stay commitment, unless so ordered by the Court of Appeals. The Attorney General shall represent the petitioner on appeal. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.10. Duty of assigned counsel; discharge. — Counsel assigned to represent an indigent respondent at the initial district court hearing is also responsible for perfecting and concluding an appeal, if there is one. Upon completion of an appeal, if any, or upon transfer of the respondent to a regional mental health facility, if there is no appeal, assigned counsel is discharged. If the respondent is committed to a community mental health facility, assigned counsel remains responsible for his representation until discharged by order of district court, or until the respondent is unconditionally discharged from the community facility. (1973, c. 1408, s. 1.)

§ 122-58.11. Rehearings. — (a) Fifteen days before the end of the initial treatment period, if the chief of medical services of the inpatient facility determines that treatment of a respondent beyond the initial period will be necessary, he shall so notify the clerk of superior court of the county in which the facility is located. The clerk, at least 10 days before the end of the initial period, on order of a district court judge of the judicial district in which the facility is located, shall calendar the rehearing, shall notify the respondent and his counsel of the time and place of the rehearing.

(b) Rehearings shall be held at the facility in which the respondent is receiving treatment. The judge shall be a judge of the district court of the judicial district in which the facility is located, or a district court judge temporarily assigned to that district.

(c) Rehearings are governed by the same procedures as initial hearings, and the respondent has the same rights he had at the initial hearing, including the right to appeal.

(d) If the court finds that the respondent is not in need of continued hospitalization, or of outpatient care, it shall unconditionally discharge him. A copy of the discharge order shall be furnished by the clerk of superior court of the county of original commitment and the facility from which the respondent is being discharged. If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others, and in need of continued hospitalization, or, in the alternative, of outpatient care, it may order hospitalization (or outpatient care, as the case may be) for an additional period not in excess of 180 days.

(e) Fifteen days before the end of the second commitment period, and annually thereafter, the chief of medical services of the facility shall review and evaluate the condition of each respondent, and if he determines that a respondent is in continued need of hospitalization or, in the alternative, of outpatient treatment, shall so notify the respondent, his counsel, and the clerk of superior court of the county in which the facility is located. Unless the respondent through his counsel files with the clerk a written waiver of his right to a rehearing, the clerk, on order of a district court judge of the district in which the facility is located, shall calendar a rehearing for not later than the end of the current commitment period. The procedures and standards for the rehearing are the same as for the first rehearing. Any recommitment ordered shall be for only such period of time as continued treatment is deemed necessary by the chief of medical services of the treatment facility, but in no event longer than one year.

(f) There are no rehearings for outpatients. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.12. Counsel for indigents at rehearings. — (a) The senior regular resident superior court judge of a judicial district in which a regional psychiatric facility for the care and treatment of the mentally ill and inebriate is located shall appoint an attorney licensed to practice in North Carolina as special counsel for the mentally ill and inebriate who are indigent. Such special counsel shall serve at the pleasure of the appointing judge, shall not privately practice law, and shall receive annual compensation within the salary range for assistant district attorneys, as fixed by the Administrative Officer of the Courts. It shall be the duty of the special counsel to represent at rehearings under this Article all indigent respondents committed to the facility by a district court judge for mental illness or inebriety, and to represent all indigent respondents who, after a rehearing, appeal to the Court of Appeals. The initial determination of indigency shall be made by the special counsel in accordance with G.S. 7A-450(a), but is subject to redetermination by the presiding judge.

(b) The regional facility shall provide suitable office space for the counsel to meet privately with respondents. The Administrative Office of the Courts shall provide secretarial and clerical service, and necessary equipment and supplies for his office.

(c) In the event of a vacancy in the office of special counsel, or his incapacity, or a conflict of interest, counsel for indigents at rehearings may be assigned by a district judge of the district from among those members of the bar who maintain law offices within 20 miles of the regional facility. Counsel may also be so assigned when, in the opinion of the Administrative Officer of the Courts, the volume of cases warrants. (1973, c. 47, s. 2; c. 1408, s. 1.)

§ 122-58.13. Release and conditional release. — The chief of medical services of a public or private mental health facility shall discharge a committed respondent unconditionally at any time he determines that the patient is no longer in need of hospitalization. He may also release a respondent conditionally, for periods not in excess of 30 days, on specified medically appropriate conditions. Violation of the conditions is grounds for return to the releasing facility. A law-enforcement officer, on written request of the chief of medical services of the facility, shall take a conditional releasee into custody and return him to the facility. Notice of discharge and of conditional release shall be furnished the clerk of superior court of the county of commitment, and the county in which the facility is located. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.14. Transportation. — (a) Transportation of a respondent to or from a clerk or magistrate, a qualified physician, a community mental health facility, and a hearing shall be provided by the city or county, which said transportation may be by city- or county-owned vehicles, or by private ambulance by contract with the city or county. If the respondent is a resident of a city, the city has the duty to provide the transportation; if the respondent is a resident of a county, outside of city limits, the county has the duty to provide transportation; if a respondent resides outside of the county, the city (or county, as the case may be) in which he is taken into custody has the duty to provide transportation; but cities and counties may contract with each other to accomplish this function. Transportation to or from a regional hospital outside the county, for any purpose, is the responsibility of the county, pursuant to G.S. 122-42. If the respondent is not indigent, the city or county is entitled to recover the costs of transportation from the respondent. A respondent being discharged from a facility may elect to use his own transportation.

(b) To the extent feasible, law-enforcement officers transporting respondents shall dress in plain clothes, and shall travel in unmarked vehicles. (1973, c. 1408, s. 1.)

§ 122-58.15. Commitment of eligible veterans to Veterans Administration facility. — References in this Article to community or regional mental health facilities shall be deemed to include any facility operated by the Veterans Administration for inpatient care and treatment of mentally ill or inebriate veterans. Such a facility may be used for temporary detention pending a district court hearing, and for commitment subsequent to such a hearing. Eligibility of the veteran-respondent for treatment at a Veterans Administration facility, and the availability of space therein, shall be determined in all cases prior to sending or committing a veteran-respondent thereto by filing with the court a certificate of eligibility from the Veterans Administration.

Rehearings for veteran-respondents committed to a Veterans Administration facility shall be held at the facility or at the county courthouse in the county in which the facility is located, and counsel for rehearings shall be assigned from among the members of the bar of the same county. (1973, c. 1408, s. 1.)

§ 122-58.16. Use of community and area mental health facilities. — Directors of community mental health facilities and area mental health programs shall submit for approval by the Division of Mental Health Services, plans consistent with this Article, for maximum utilization of community and area mental health facilities. Such plans shall be formulated after consultation with local court officials and the local medical society. (1973, c. 1408, s. 1.)

§ 122-58.17. Respondents committed under prior law. — Respondents committed to a mental health facility for a specific period of time prior to the effective date of this Article shall be deemed to have been committed, for the same period of time, under this Article. Respondents committed for an indefinite period of time shall be processed under this Article, with the initial district court hearing conducted within 30 days after the effective date of this Article. (1973, c. 1408, s. 1.)

§ 122-58.18. Special emergency procedure for violent persons. — When a person subject to commitment under the provisions of this Article is also violent and requires restraint, and delay in taking him to a qualified physician for examination would likely endanger life or property, a law-enforcement officer may take the person into custody and take him immediately before a magistrate or clerk. The law-enforcement officer shall execute the affidavit required by G.S. 122-58.3, and in addition shall swear that the respondent is violent and requires restraint, and that delay in taking the respondent to a qualified physician for an examination would endanger life or property.

If the clerk or magistrate finds by clear, cogent, and convincing evidence that the facts stated in the affidavit are true, and that the respondent is in fact violent and requires restraint, and that delay in taking the respondent to a qualified physician for an examination would endanger life or property, he shall order the law-enforcement officer to take the respondent directly to a community or regional mental health facility designated for the custody and treatment of such persons under this Article.

Respondents received at a community or regional mental health facility under the provisions of this section shall be examined and processed thereafter in the same manner as all other respondents under this Article. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-59: Repealed by Session Laws 1973, c. 726, s. 2.

CERTIFICATE OF SERVICE

I, William F. O'Connell and Isaac T. Avery, III, attorneys for The Honorable A. Eugene Blackburn, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of June, 1977, I served a copy of the foregoing Motion to Affirm and Brief in Support Thereof on the appellant thereto by mailing a copy in a duly addressed envelope, with first-class postage prepaid to:

Bertram Ervin Brown, II
The Legal Aid Society of Forsyth County
202 West Third Street
Winston-Salem, North Carolina 27101

Barry Nakell
1310 Le Clair Street
Chapel Hill, North Carolina 27514

This the 15 day of June, 1977.

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